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No. 114

**In the Supreme Court of
the United States**

OCTOBER TERM, 1941

J. T. MCCARTHY, JR., Doing Business as Hercules Supply
Company, and G. L. MEHOLIN,
Petitioners,

VERSUS

H. C. WYNNE, and AMERICAN EXCHANGE BANK
OF HENRYETTA, OKLAHOMA,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE TENTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF**

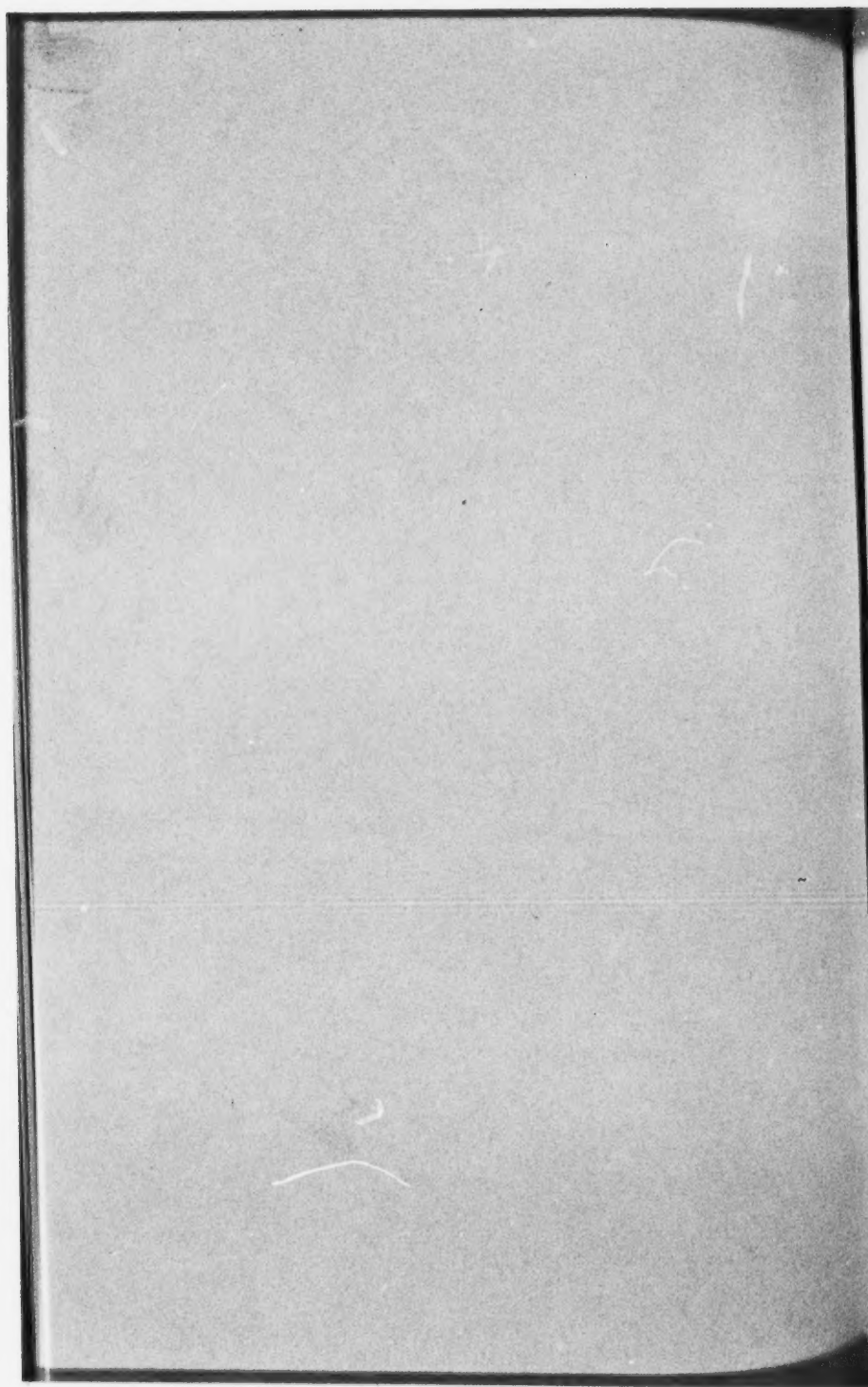
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June, 1942.



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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED
STATES:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

Inasmuch as the record is in two volumes, a special statement with respect to their identification for reference purposes is required. The larger of the two volumes, marked "Exhibit 100," is the transcript of the record on first appeal of this case to the Circuit Court of Appeals for the Tenth Circuit. Because of having been introduced in evidence in its entirety at the trial following the first ap-

peal, and because of containing parts of the record of the case material to the second appeal, it became a part of the record on second appeal. By stipulation of counsel and with the consent of the Circuit Court of Appeals and of this Court, this volume has not been reprinted and remains in its original form. It will be referred to as "OR," indicating Original Record. The second or smaller volume, bearing case No. 2377, is that part of the transcript of the record on second appeal which includes all proceedings in the case subsequent to first appeal. It will be referred to as "NR," indicating New Record. This designation was adopted by both parties in the court below.

H. C. Wynne, as plaintiff, seeking to enforce an express written contract, brought this suit against J. T. McCarthy, Jr., doing business as Hercules Supply Company, as defendant, for an equitable accounting for merchandise delivered to McCarthy pursuant to the contract and for a judgment, not in a sum certain, but in such amount as should be determined from such accounting to be due plaintiff under the contract. The suit was originally filed (OR 1) in the State District Court of Oklahoma County, Oklahoma, and was later removed (OR 19) to the United States District Court for the Western District of Oklahoma, where it was docketed as a suit in equity. (Original Petition OR 1-11; amendments made prior to first appeal OR 26-29. The petition as amended and in a more convenient composite form is set out at NR 223-234.)

McCarthy answered, admitting the contract and the receipt of the merchandise, but in substance alleged, in

addition to other defenses not material here, that he had complied with the contract; that he had paid for all the merchandise that was to have been purchased; and that he had at different times offered to return all consigned merchandise remaining on hand. By way of cross-claim McCarthy, himself relying on the written contract and subsequent oral agreements relating thereto, prayed judgment for amounts claimed to be due him (Original answer and cross-petition OR 30-40, and amendments thereto OR 40-44).

Because of the nature of the action and Wynne's theory of recovery, namely, that the accounting in equity based on an express written contract, upon which both parties were relying, the parties stipulated that the case was properly on the equity docket, and being a case properly on the equity docket triable by the Court without a jury, waived a jury and agreed to the reference of the case to a Special Master (NR 8).

In his motion for the appointment of a Special Master, Wynne stated as grounds for the motion (OR 46-47): "This is an action for an accounting in which references are authorized by Federal Rule 59 * * *." In further support of the motion affidavit of counsel for Wynne was attached (OR 47-48), again defining the relief asked to be that of accounting, coupled with the assertion "that this is a suit brought upon a written contract by the terms of which * * *," followed by a statement of the terms of the contract.

Upon the record as thus made and the issues so presented the case was referred to (OR 50) and tried by a Special Master. The case was proceeded with and tried on the theory of an equitable accounting predicated solely upon the enforcement of the terms and provisions of the express written contract. A search of the entire record of the proceedings will fail to disclose wherein the issue of "conversion" was ever contended for, suggested, or even thought of, by either party or by the Master or by the district court prior to the first appeal. Conversion of the property was not in issue. McCarthy was not called upon to meet or to introduce any evidence with respect to the issue of conversion. The suit was upon the contract.

The Master made his findings of fact (OR 57-66) and conclusions of law (OR 66-68) and recommended that judgment be entered in favor of Wynne (OR 68), all based on the contract. Inconsistent with and precluding any thought or claim of conversion he found (Conclusion of Law IV, OR 66), in accord with the contention of Wynne, "that the contract is one of sale of the entire stock of merchandise," thereby passing title to McCarthy, and then, by applying what he determined to be the contract formula for arriving at the sale price, reached the amount of the recommended judgment (OR 68). On the same theory (Conclusion of Law VI, OR 67) the Master denied McCarthy recovery on his cross-petition. Based on the findings of fact and conclusions of law of the Master, except only as to a recalculation of amounts, the district court en-

tered judgment for Wynne in the sum of \$5,790.29 (Opinion OR 107-108, decree OR 111-113).

An appeal was taken to the Tenth Circuit Court of Appeals by both parties, resulting in a decision by that Court (*Wynne v. McCarthy*, 10th C. C. A., 97 Fed. (2d) 964, May 31, 1938), holding, foreign to any contention of either party, that because an essential element of the contract was left for future agreement of the parties, and since such future agreement was never consummated, the contract never became obligatory on either party and neither party was entitled to the recovery he sought based thereon. The Court proceeded to say that since the contract "to sell" was never consummated, title to the merchandise never passed to McCarthy, and hence Wynne's remedy was that of an action for conversion, or upon an implied contract to pay the value of the merchandise arising out of conversion, rather than an action upon the express contract. The Court did not purport to say when the conversion occurred.

Assessing the costs equally between the parties, the Court directed:

"Let the judgment be vacated and the cause remanded with instructions to permit Wynne to amend his petition and to proceed further in accordance with this opinion."

The mandate followed the language contained in the Court's opinion (NR 13).

Pursuant to the authority of the mandate, Wynne procured leave (NR 14) and filed his amended petition

(NR 15-16), setting up and stating a simple cause of action at law for a money judgment in a sum certain for conversion.

In due time McCarthy filed an amended answer (NR 16), asserting his defenses to such action for conversion. Within the time prescribed by Rule 38, Federal Rules of Civil Procedure, McCarthy filed his demand for a trial by jury as follows:

"The above named defendants demand a trial by jury of all issues triable of right by a jury which are raised by plaintiff's petition as amended and the answers of defendants." (NR 23.)

At the pretrial conference the trial court took the position and held that under the opinion of the Circuit Court of Appeals on first appeal, the only issue left in the case was that of the value of the merchandise and, in line with this holding, ordered: (a) That the defendant's answer be stricken; (b) that the further hearing in the case be limited to the value of the property at the time of conversion; and (c) that McCarthy's demand for a jury trial be denied (NR 25-26).

McCarthy thereupon filed an amended answer (NR 27) in the form of a general denial, being in substance the only answer that could be filed under the order of the Court.

A trial of the case limited to the sole issue of the value of the merchandise was had by the Court without a jury (NR 39-40) resulting in a judgment for Wynne in the sum of \$13,150.95, with interest at the rate of 6% per annum

from February 15, 1925 (NR 29-30). Although there had never been any finding or determination prior to such time as to when the alleged conversion occurred, the Court, without evidence of that fact, assumed that it occurred at the time it was alleged by plaintiff to have occurred, namely, in February, 1925, when the goods were first delivered to McCarthy (NR 40-41).

McCarthy took an appeal to the Circuit Court of Appeals, which on February 26, 1942, affirmed the judgment of the district court (NR 179-184). Petition for rehearing was denied on April 14, 1942 (NR 236).

The principal questions involved on said appeal insofar as they are material here were (NR 1-2):

1. Error of the trial court in limiting McCarthy's defenses and the second trial of the case to the one issue of the value of the property.
2. Error because of the denial to McCarthy of a jury trial.

In its opinion (NR 179-184, *McCarthy v. Wynne*, 126 Fed. (2d) 620), the Circuit Court of Appeals in substance held: That its opinion on first appeal amounted to an adjudication of the issue of conversion; that the effect of its mandate was to limit the further trial of the case to the one issue of the value of the property at the time of the conversion; and that the agreement waiving a jury at the time of the first trial was binding upon the parties throughout the entire litigation.

Statements by counsel for Wynne, with respect to the variance in the issues before and after the first appeal and

asserting that conversion was not an issue prior to the first appeal are set out in the Record at NR 202-205.

There is no controversy between any of the other parties to the action separate and apart from the controversy between Wynne and McCarthy, hence no special mention need be made of such other parties.

II.

STATEMENT OF BASIS OF JURISDICTION

It is believed that the jurisdiction of this Court to review the judgment in question is sustained by:

Section 240 of the Judicial Code as amended (Title 28, Sec. 347, subd. (a), U. S. C. A);

Rule 38, Section 5, subsec. (b), of the Rules of this Court as amended; and

The cases of *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188;

Demick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296, 79 L. ed. 603;

Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879, in which writs of certiorari to Circuit Courts of Appeals were entertained by this Court to review action by the courts below denying or limiting the right of trial or curtailing the right of trial by jury.

The reasons why under said Rule 38 aforesaid this Court has jurisdiction are set out under heading IV of this petition, entitled, "Reasons Relied on For the Issuance of Writ."

Date of the judgment sought to be reviewed is February 26, 1942 (NR 184). A petition for rehearing was denied on April 14, 1942 (NR 101).

III.

QUESTIONS INVOLVED

(1) The correctness of the decision of the court below holding that under its former opinion and mandate the trial court properly limited McCarthy's defenses and the second trial to the single issue of the value of the property at the time of the alleged conversion.

(2) The correctness of the decision of the court below holding that McCarthy was not entitled to a trial by jury on such second trial.

IV.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

1. In holding that the trial court correctly limited petitioner's defenses and the trial to the single issue of the value of the property, the Circuit Court of Appeals decided an important question of Federal law of procedure in the Federal Courts in a way probably in conflict with the applicable decisions of this Court and the Circuit Courts of Appeals for other Circuits, including the cases of:

Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879;

Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188;

Hodges v. Easton, 106 U. S. 408, 1 S. Ct. 307, 27 L. ed. 169;

Indemnity Ins. Co. of North America v. Levering (9th C. C. A.), 59 Fed. (2d) 719;

McKeon v. Central Stamping Co. (3rd C. C. A.), 264 Fed. 385.

2. In holding that the effect of its mandate on first appeal was to limit further proceedings to the issue of the amount of damages, the Circuit Court of Appeals decided an important question of Federal law and of the procedure in the Federal Courts in a way probably in conflict with the decisions of the Circuit Courts of Appeals for other Circuits, including the cases of:

Indemnity Ins. Co. of North America v. Levering (9th C. C. A.), 59 Fed. (2d) 719;

Millers Mutual Fire Ins. Assn. v. Bell (8th C. C. A.), 99 Fed. (2d) 289;

McNee v. Williams (8th C. C. A.), 280 Fed. 95.

3. In holding that the agreement waiving a jury trial at the time of the first trial was binding upon the parties on second trial, the Circuit Court of Appeals decided an important question, not only of Federal law and procedure, but of general law, in a way probably in conflict with the decisions of the Circuit Courts of Appeals for other Circuits and the overwhelming weight of authority, including the cases of:

Burnham v. North Chicago Street Ry. Co. (7th C. C. A.), 88 Fed. 627, 628;

F. M. Davis & Co. v. Porter (8th C. C. A.), 248 Fed. 397.

4. The denial to petitioner by the lower court of the right to interpose his defenses to the amended petition alleging for the first time a conversion of the merchandise on February 10, 1925, the limiting of the trial to the sole issue of the value of the property, and the denial of petitioner's request for a jury, sanctioned by the decision of the Circuit Court of Appeals affirming the judgment of the lower court, is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 2377, J. T. McCarthy, Jr., doing business as Hercules Supply Company, and G. L. Meholin, Appellants, vs. H. C. Wynne, and American Exchange Bank of Henryetta, Oklahoma, Appellees, and that said judgment of the said United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Court, and that your petitioners be granted such other and further relief in the premises as to this Court seem meet and proper.

Dated at Oklahoma City, Oklahoma, this 1st day of
June, 1942.

J. T. McCarthy, Jr., Doing Business as
Hercules Supply Company, and

G. L. Meholin,

By JOHN H. MILEY,
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June, 1942.

